A

NOR AZAHAR ZAINOL

v.

PENTADBIR TANAH DAERAH LANGKAWI

B

HIGH COURT MALAYA, ALOR STAR
HO MOOI CHING JC
[ORIGINATING SUMMONS NO: 24-912-2001]
13 APRIL 2009

C ***CIVIL PROCEDURE:*** *Functus officio - Summons in chambers application - Whether directly related to a judgment recorded and to give effect to it - Whether contravened consent judgment entered - Whether court had jurisdiction to hear application*

D ***CIVIL PROCEDURE:*** *Judgment - Consent judgment - Whether there was provision made for payment of premium for land - Whether payment made in contravention of binding judgment entered*

The plaintiff had paid the sum of RM2,840 to the defendant as land premium for land known as HS(M) 210-94 Mukim Kuah,
E Tempat Buluh Penyumpit ('Lot 3130'). However, the land title was not issued to the plaintiff as it had been alienated to LADA. The plaintiff then filed an originating summons seeking relief and a consent judgment was recorded whereby the defendant was to grant a piece of land known as Lot 653 Mukim Kuah, Sungai Tarum
F ('Lot 653') to replace the said Lot 3130. Seven months after the judgment had been recorded, the plaintiff was asked to pay the sum of RM16,951 ('the said sum') as land premium, failing which the land title would not be issued. The plaintiff paid the said sum under protest and filed a summons in chambers in encl. 23. The
G court allowed the plaintiff's application seeking the refund of the said sum. Hence, the defendant appealed against that decision. The issues that arose were (i) whether the court was *functus officio* and (ii) whether plaintiff was required to pay any premium beyond what had already been paid for Lot 3130.

H

Held (allowing plaintiff's application):

(1) Although the cause of action was extinguished when the consent judgment was entered, the application in encl. 23 was
I not of a fresh and substantial nature but was directly related to the judgment recorded and to give effect to it. The application

did not contravene para. (d) of the consent judgment as it was not a claim in respect of Lot 3130. The court had the jurisdiction to hear the application in question. (para 7)

(2) The consent judgment in its entirety called for Lot 653 to be given without any payment of premium as no provision was made for such payment. This interpretation was reinforced by para (c) which contained the promise of the defendant to enter the plaintiff's name in the new grant within three months from the date of the order, without more from the plaintiff. The last ditch attempt by the defendant to introduce a fresh term was an afterthought that would have undermined the judgment that was valid and binding. The plaintiff had paid the premium under threat of losing Lot 653 and payment was made in contravention of the binding judgment entered. (paras 8, 9 & 10)

Case(s) referred to:

Abdul Rashid Maidin & Ors v. Lian Mong Yee [2008] 1 CLJ 1 CA ***(refd)***

Gai Hin Refrigeration Sdn Bhd v. Kamanis Holdings Sdn Bhd [2004] 4 CLJ 232 CA ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***

Plenitude Holdings Sdn Bhd v. Tan Sri Khoo Teck Puat & Anor [1993] 3 CLJ 653 HC ***(dist)***

For the plaintiff/applicant - Ranjit Singh Dhillon; M/s Ranjit Singh Dhillon & Co

For the defendant/respondent - Murtazadi Amran; State Legal Advisor

Reported by Suhainah Wahiduddin

JUDGMENT

Ho Mooi Ching JC:

[1] This court allowed the application of the plaintiff/respondent ('plaintiff') in encl. 23 seeking the refund of the sum of RM16,951 that had been paid under protest to the defendant/appellant ('defendant'). The defendant now appeals against that decision.

[2] Undisputed facts

It is common ground that on 28 July 1994, the plaintiff paid the sum of RM2,840 to the defendant as land premium for land known as HS (M) 210-94, Mukim Kuah, Tempat Buluh Penyumpit, PT

3130 ('Lot 3130'). The land title was not issued to the plaintiff as the same land had also been alienated to LADA. The plaintiff filed an originating summons seeking relief and a consent judgment was recorded in the following terms:

> (a) Defendan akan memberi kepada plaintif, sebidang tanah yang dikenali sebagai Lot 653, Mukim Kuah, Sungai Tarum, Langkawi sebagai ganti tanah atas Lot PT 3130 ... yang mana hartanah tersebut (Lot 3130) telah diberi hakmilik kepada LADA; dan
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> (b) Lot 653 yang diberi adalah tidak termasuk sungai dan rizab jalan yang sedia ada; dan
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> (c) Defendan akan memasukkan nama plaintif ke dalam Geran Baru dalam tempoh tiga bulan dari tarikh perintah ini dan Geran Asal Lot 653 akan diserahkan kepada plaintif; dan
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> (d) Plaintif tidak akan membuat apa-apa tuntutan lagi berkenaan dengan hartanah yang dikenali sebagai Lot PT 3130 ..;
>
> (e) Tiada perintah terhadap kos.

[3] Some seven months after judgment had been recorded, the plaintiff was asked to pay a sum of RM16,951 as land premium, failing which the land title would not be issued. The plaintiff paid the sum under protest and filed a summons in chambers in encl. 23.

[4] Jurisdiction: Issue of *'functus officio'*

During the hearing, I invited submissions on whether this court was *functus officio*. Encik Murtazadi bin Amran, appearing for the defendant submitted that that the court was *functus officio* and the plaintiff should have filed a fresh action for the return of the premium paid. Reliance was placed on the case of *Gai Hin Refrigeration Sdn Bhd v. Kamanis Holdings Sdn Bhd* [2004] 4 CLJ 232, where the Court of Appeal held that the learned judge had erred in law, as well as on the facts, when he varied the terms of the consent judgment upon the defendant's application to set aside the whole of the consent judgment. It was further held that he was *functus officio* after having dismissed the defendant's application to set aside the consent judgment and had no jurisdiction to alter or vary the consent judgment thereafter (see also *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92). I found these authorities of no application to the instant case as the application before this court was not one to set aside or vary the consent judgment recorded.

[5] In *Plenitude Holdings Sdn Bhd v. Tan Sri Khoo Teck Puat & Anor* [1993] 3 CLJ 653, the High Court had ordered specific performance of a sale and purchase agreement and the appeal against that order was dismissed by the Supreme Court. Subsequently, the plaintiff paid the balance purchase price and obtained valid and legal title to the land. The second defendant then filed a summons-in-chambers seeking an order that for the purpose of specific performance of the agreement, the plaintiff should pay to the second defendant a further sum of RM11,000 per day from 21 May 1985 to the date of payment being liquidated damages expressly provided for under agreement. PS Gill J (as he then was) dismissed the second defendant's application on the ground that the court is *functus officio* once judgment had been pronounced and the order perfected. The learned judge also observed that the issue of liquidated damages had not been raised in its pleadings and no satisfactory explanation had been given as to why it had not been raised during the trial. This case does not support the defendant's submission as it can be distinguished from the instant case where the application of the plaintiff raises no new issue that had not been raised in the substantive proceedings. On the contrary, it is the defendant which has unilaterally chosen to impose a new term on the plaintiff that had not been part of the terms of settlement.

[6] In *Abdul Rashid Maidin & Ors v. Lian Mong Yee* [2008] 1 CLJ 1, the Court of Appeal again reiterated that after a judge has made a final order that has been perfected, he is *functus officio* and has no jurisdiction to amend or vary his order or re-hear the issues, save where the order can be said to be a nullity. Zulkefli Ahmad Makinuddin JCA (as he then was) (delivering the judgment of the court) held that an action filed by way of an originating summons is an originating process while a summons-in-chambers is a subsidiary process that draws its life from the originating process. In the context of that case, the Court of Appeal held that when the originating process had been fully heard and finally disposed of, the cause of action was extinguished and no further application of a fresh and substantial nature might be made by the plaintiffs by way of a summons-in-chambers save those specifically permitted or directed by the original orders of the court.

[7] In the instant case, although the cause of action was extinguished when the consent judgment was entered, the application in encl. 23 was not of a fresh and substantial nature but was directly related to the judgment recorded and to give effect to

it. The application did not contravene para. (d) of the consent judgment as it was not a claim in respect of Lot 3130. I therefore decided that this court had the jurisdiction to hear the application in question.

[8] Merits of the application

It was submitted for the plaintiff that the words 'akan memberi' or 'will give' in para. (a) of the consent judgment means 'to give free of charge' while the defendant submitted to the contrary. To my mind, the consent judgment must be taken as comprehensive and containing all the terms of settlement since it had not been set aside or varied. Reading the consent judgment in its entirety, my view is that the judgment called for Lot 653 to be given without any payment of premium as no provision was made for such payment.

[9] This interpretation is reinforced by para. (c) which contains the promise of the defendant to enter the plaintiff's name in the new grant within three months from the date of the order, without more from the plaintiff. Had the plaintiff been required to pay any premium beyond what had already been paid for Lot 3130, it should have been clearly stated in the judgment so that time began to run from the date of payment of the premium rather than the date of the judgment. As it was, the entire burden of performing paras (a) and (c) of the judgment was squarely on the defendant and the last ditch attempt by the defendant to introduce a fresh term was an afterthought that would have undermined the judgment that was valid and binding. The plaintiff's only duty was not to make any claims in respect of Lot 3130.

[10] The plaintiff had paid the premium under threat of losing Lot 653 and payment was made in contravention of the binding judgment entered. For the reasons stated, I allowed the plaintiff's application.